Sullivan Industries, Inc. *and* United Steelworkers of America, AFL–CIO. Cases 1–CA–25698 and 1–CA–25869

March 21, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 8, 1989, Administrative Law Judge Irwin Kaplan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the administrative law judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sullivan Industries, Inc., Claremont, New Hampshire, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to certain credibility findings made by the administrative law judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In his decision, in the second full paragraph under ''1. Credibility,'' the judge stated that David Pollock held two meetings with his employees on the same day in early July. The record discloses, however, that the two meetings were held on different days within the same week. This error does not affect our decision.

In the second paragraph of sec. III,b,2, of the judge's decision, certain language was inadvertently omitted from the quotation from *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). Thus, the second sentence of the quoted language should state: ''It studies whether the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production.'' Additionally, the end of the last sentence of the quotation should read ''as well as the relative certainty of the employer's expected expansion.''

[2] We adopt the judge's conclusion that the Respondent had attained a substantial and representative complement by August 10, 1988. Although we agree with the judge's finding that the Respondent's projections of employment levels were unreliable, we note that even under the Respondent's projections it expected to employ 180 unit employees in the projected peak month of April 1989 and 150–160 unit employees in the anticipated slack months of October and November 1989. We find that, even compared with these projections, the 79 unit employees employed during the pay period ending August 12, 1989, constituted a substantial and representative complement. In adopting the judge's finding of a substantial and representative complement, we do not rely on his references to the Respondent's stipulated successor status.

Robert P. Redbord, Esq., for the General Counsel.

Donald W. Selzer, Esq. (Oppenheimer, Wolff & Donnelly), of St. Paul, Minnesota, for the Respondent.

Larry Engelstein, Esq. (Angoff, Manning, Pyle, Wanger & Hiatt), of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. These consolidated cases were tried before me in Boston, Massachusetts, on February 13 and 14, 1989. The underlying charges in Case 1–CA–25698 were filed by the United Steelworkers of America, AFL–CIO (the Charging Party or the Union), on August 9, 1988 (amended September 30, 1988). The underlying charges in Case 1–CA–25869 were filed by the Union on October 18, 1988 (amended November 22, 1988). These charges and amendments thereto gave rise to an order consolidating cases, consolidated amended complaint, and notice of hearing dated December 6, 1988.

In essence, it is alleged that Sullivan Industries Inc. (Respondent or New Sullivan), became a succesor company to Sullivan Machinery Company (Old Sullivan or SMC) and in that capacity it unlawfully withheld recognition from the Union from August 10 to October 4, 1988, thereby violating Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Further, it is alleged that the Respondent additionally violated Section 8(a)(5) and (1) of the Act, by withdrawing recognition from the Union on or about October 6, 1988, after first having unduly delayed granting recognition on or about October 4, 1988.

It is alleged that the Respondent independently violated Section 8(a)(1) of the Act by making certain coercive statements to employees at a meeting in mid-August 1988, to the effect, that the Respondent would defer any decision regarding union recognition until October 1988 but that recognition would be automatic unless the employees advised said Respondent that they did not want union representation. In this connection, it is alleged that the Respondent advised its employees that it maintains an open-door policy and that employees could communicate their opposition to union representation at any time. The consolidated amended complaint was amended near the close of the hearing to allege that at the same meeting the Respondent also unlawfully told employees that it would do what it intended, with or without the Union, thereby, additionally violating Section 8(a)(1) of the Act.

The Respondent filed a corresponding answer and amended answer and along with certain stipulations at the hearing, it conceded, inter alia, jurisdictional facts, appropriateness of the unit, and successor status but denied that it committed any unfair labor practices. In particular, the Respondent denied that it unduly delayed recognizing the Union in October 1988 rather than August 1988 on the asserted basis that said Respondent did not employ a representative complement of employees until October 1988. The Respondent asserted that it withdrew recognition on the basis of a petition signed by a majority of its employees stating that they did not want the Union to represent them. With regard to the alleged 8(a)(1) statements, the Respondent denied that they were made as alleged or that they were coercive.

Based on the entire record,[1] including my observations of the demeanor of the witnesses, and after careful consideration of the posttrial briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Sullivan Industries, Inc., a corporation with an office and place of business in Claremont, New Hampshire (the Claremont facility), is engaged in the manufacture and sale of compressors. During the past 9 months, in connection with the aforenoted business operations, the Respondent sold and shipped products, goods, and materials from its Claremont facility, directly to points outside the State of New Hampshire and derived revenue therefrom in excess of $50,000. It is alleged, the answer admits, the record supports, and I find that the Respondent is, and has been at all times material here, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is alleged, the answer admits, the record supports, and I find that the United Steelworkers of America, AFL–CIO is now and has been at all times material here, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

The Union has represented the production and maintenance employees excluding office and clerical workers and other traditional exclusions employed at the Claremomt, New Hampshire facility for over 40 years. For the greater part of that period, the Claremont facility was owned and operated by Joy Manufacturing Company (Joy). Joy manufactured air compressors and rock drills used primarily in the construction of highways and pipelines.

In the spring of 1984, Joy sold the operation to Sullivan Machine Company (SMC or Old Sullivan). SMC was engaged in essentially the same business as Joy. The unit employees employed by SMC continued to be represented by the Union. SMC and the Union negotiated successive collective-bargaining agreements, the most recent of which was executed on May 4, 1987, and by its terms, effective until 12:01 a.m., September 29, 1990. (E. Exh. 3.) Old Sullivan declared bankruptcy in March 1988,[2] and closed the Claremont facility. That same month, the Respondent, Sullivan Industries, Inc. (New Sullivan), incorporated for the purpose of acquiring the assets of Old Sullivan and eventually taking over the business. (Tr. 216.)

On April 18, the bankruptcy court appointed Asset Acquisition and Management Corporation (AAMC) to manage the business on an interim basis. While under Chapter 11, some of the Old Sullivan employees and supervisors were recalled and SMC resumed operations on a limited basis but under AAMC management. During the period of AAMC's stewardship, it continued to recognize the Union and adhere to the terms of the SMC-union collective-bargaining agreement. (Tr. 32.) AAMC also continued to deduct union dues under the checkoff provision of the contract. (Tr. 33; see also G.C. Exh. 4.)

By letter dated June 10, 1988, Old Sullivan's personnel manager, Norman Brunelle, advised the Union, inter alia, that SMC will terminate its business as of June 30, 1988.[3] The body of that letter in its entirety reads as follows:

> This letter is to advise you that the Sullivan Machinery Company will be terminating its business as of June 30, 1988. In that connection, the assets of the business are being sold, and all employees of the Company will be terminated. Termination notices are being mailed to the employees. Any inquiries that you may have about this matter should be directed to David A. Pollock of Asset Acquisition and Management Corporation for the Company by the Bankruptcy Court. [R. Exh. 2.]

Also by letter dated June 10, 1988, Brunelle invited all Old Sullivan employees to submit applications to New Sullivan. (R. Exh. 1.) That same month, David Pollock, who had overall duties of managing SMC for AAMC, undertook certain activities in contemplation of the transfer of ownership to New Sullivan. As testified by Pollock: ''We were expecting to acquire the assets [of Old Sullivan] and we were lining up financing and setting or preparing to hire employees for the new company.'' (Tr. 91–92.)

On June 30, Pollock met separately with two groups of SMC employees (managed by AAMC) with regard to employment prospects at New Sullivan. There were approximately 12 unit employees in the first group. Pollock told them that SMC would shut down that day but that New Sullivan would commence operations the following week. However, Pollock also informed these employees that while none of them would be offered jobs initially with the new company, it is anticipated that 30 to 40 employees will be hired over the next few months and they will be under consideration.[4] The second meeting that day was held with a much larger group comprising unit and nonunit employees, approximately 64 in number and all of them were offered employment with New Sullivan. (Tr. 107–108.) According to Pollock, these employees had the broadest range of skills and abilities and as the new company would initially operate with fewer employees, versatility was preferred.

On July 5, the sale to New Sullivan was completed. Pollock became its president and chief operating officer. On July 6, employees began their first day of work for the new company. The front-line supervision employed by Old Sullivan continued to work for AAMC and New Sullivan but they were fewer in number (Tr. 54, 212–215). On or about July 6, local union president, Ivan Truell, and other union representatives met with Pollock and other New Sullivan officials and requested recognition and adherence to the collective-bargaining agreement. Pollock told the union representatives that they would have to wait until the Company hired a substantial and representative complement of employees before New Sullivan would decide on recognition. With regard to the contract, Pollock noted that New Sullivan was not a party thereto and that he would not honor the agree-

[1] The General Counsel's unopposed motion to correct transcript is granted.

[2] All dates hereinafter refer to 1988 unless otherwise indicated.

[3] Brunelle served in the same capacity for AAMC and subsequently for New Sullivan when the latter company purchased Old Sullivan's assets.

[4] Most of the employees in this group were eventually hired by New Sullivan. (Tr. 264.)

ment. That same day Pollock wrote to Truell summarizing the respective positions taken at the meeting. (G.C. Exh. 12.) Still that same day, July 6, union staff representative, Frank Farrell, wrote to Pollock, demanding recognition by New Sullivan as a ''successor'' to SMC, as well as adherence to the contract. (G.C. Exh. 13.) Pollock responded by letter dated July 12. Again, Pollock noted that recognition at that time was ''premature.'' He also maintained, contrary to the Union, that ''this company regards itself as free to choose its own employees, and make its own contracts.'' (G.C. Exh. 14.)

On or about July 6 and within a day or two of Truell's demand for recognition, Pollock assembled the unit employees (then—approximately 50 in number), to inform them of his earlier meeting with the union committee.[5] Later that week, Pollock conducted a second meeting which this time included nonunit employees. In essence, Pollock repeated what he had told the Union and the unit employees earlier, to wit, that it was premature to recognize the Union and that the Company was not obligated and would not honor the contract.

By letter dated July 22, Larry Engelstein, the union attorney, repeated the Union's demand for recognition. There, Engelstein also asserted as follows:

> The Company has hired a substantial and representative complement of its employee workforce from employees formerly employed by Sullivan Machinery Company, and represented by the Union. Based on information available at this time, some 60 of the 65 employees hired by the Company were previously employed by Sullivan Machinery.[6]
>
> Please advise whether the Company will recognize the Union and commence bargaining. If the Company declines to do so, the Union will file the appropriate charge with the National Labor Relations Board [G.C. Exh. 15].

Respondent's attorney, Donald Selzer, responded by letter dated August 10.[7] There, Selzer advised Engelstein, inter alia, as follows:

> Sullivan industries expects to reach normal or substantially normal production, with a substantial and representative complement of workers, in the week of October 3, 1988. At that time, Sullivan Industries will respond directly to the demand for recognition. [G.C. Exh. 16.]

The subject of the Union was raised again in August at the next general meeting of all unit and nonunit employees. In all, approximately 90 to 100 employees attended that meeting. At these general meetings, and at the August meeting, Pollock informed the entire work force about production and sales for the previous month and projections for sales and shipments for the upcoming month. While it is unclear who introduced the subject of the Union at this meeting, it is undisputed that Pollock told the employees that the Company anticipated reaching a substantial and representative complement in late September or early October and a determination vis-a-vis union recognition would be made at that time. In dispute however, is whether Pollock made other remarks alleged to be coercive.

Employee Leon Morin testified that Pollock told those assembled at the August meeting as follows:

> [H]e would recognize the Union, he has no problem with it, and that if the people didn't want the the Union, they'd have to come forward and tell him, and that he had an open door policy that people could go in and talk to him any time they wanted . . . [B]ecause he had more than 51 percent of union members back that the Union [would automatically come back] unless the the members came forward and said they didn't want the Union. [Tr. 57.]

Morin's testimony was largely corroborated by employee Patrick McCann.[8] (Tr. 83–84.) On the other hand, Pollock denied making any reference to an open-door policy at the August meeting and while he had articulated such a policy on other occasions, he denied doing so within the context of any union discussion. (Tr. 139–140.) Pollock also does not recall using the word ''automatic'' in discussing union recognition with employees. (Tr. 141.) According to Pollock, (relying on notes he had at the August meeting), he told the employees that in the meantime he intended to do what he wanted, with or without a union. (Tr. 289.) (Near the close of the hearing, counsel for the General Counsel amended the complaint further to allege this last statement as coercive, in violation of Section 8(a)(1).) (Tr. 293.)

The next time the subject of the Union was raised before the entire work force was at the general monthly meeting held on or about September 1. There were approximately 120 employees in attendance, of which approximately 90 were unit employees. Pollock reviewed the overall production for August and compared those results with the Company's projections for that month and also set forth the projections for sales and shipments for the month of September. He then introduced the subject of the Union. On that subject, Pollock once again informed the employees that it was anticipated that in October the Company would have a ''substantial representative complement of employees'' as well as ''approaching normal production'' and a determination regarding union recognition would be made at that time. (Tr. 150–151.)

In early October, the Respondent determined that it was obligated to recognize the Union. By letter dated October 4, Selzer, the Respondent's attorney, responded to the Union's latest demand for recognition (letter of August 10). There, Selzer wrote, in pertinent part, as follows:

[5] Pollock testified initially, that he told the employees that it was not appropriate at that time to recognize the Union and that a decision thereon would be deferred until the Company hired a substantial and representative complement of employees. (Tr. 123.) Later, Pollock asserted that he was mistaken and denied saying anything about a ''substantial and representative complement'' in discussing the subject of the Union with employees in July. (Tr. 272–273.) The notes relied on by Pollock indicate that in raising the subject of the Union's status with employees in July, he noted that its status was ''not clear'' and that the Company had not hired its ''*total workforce*.'' (R. Exh. 6, emphasis added.) Pollock's overall credibility will be treated more fully, infra.

[6] The parties stipulated, inter alia, that at all relevant and material times, the majority of unit employees employed by New Sullivan were previously employed by Old Sullivan. (Tr. 16.)

[7] The Union filed the original refusal to recognize charges on August 9. (G.C. Exh. 1(a).)

[8] Morin and McCann had served on the union committee and in various other union capacities.

> As of this week, a majority of Sullivan Industries production and maintenance employees are persons employed as bargaining unit employees by the former owners of the plant. Insofar as there exists a presumption that these employees desire representation by the [Union], it would appear at this time that the [Union] should be recognized as the bargaining representative of the production and maintenance employees at the Sullivan Industries facility.
>
> I assume that representatives of the [Union] will be in touch with management at Sullivan. [G.C. Exh. 17.]

Soon after the aforenoted letter was sent, Pollock assembled the bargaining unit employees, approximately 90 in number, and informed them of the unfair labor practice charges against Respondent and that the Company believes that it is obligated to recognize the Union and has so advised the Union and the Labor Board. (Tr. 153–154.) That same day, and within a few hours of the aforenoted meeting, an employee, Paul Lacroix, handed Pollock a petition signed by 60 employees stating that they did not ''wish to be represented by the Steelworkers Union or any union at this time.'' (R. Exh. 7a; see also R. Exh. 7b, the typed list.) According to Pollock, he had Personnel Manager Brunelle compare the signatures with the Company's payroll records. Pollock then authorized Selzer to write the Union withdrawing recognition. By letter dated October 6, Selzer wrote Engelstein as follows:

> In my correspondence to you dated October 4, 1988, I indicated that Sullivan Industries would recognize the the United Steelworkers of America as the collective bargaining representative of its employees, based on the fact that a majority of its production and maintenance employees, as of that date, were bargaining unit members employed by the former owners of the plant. On October 5, 1988, Sullivan Industries President David Pollock informed Sullivan employees at a meeting of my correspondence to you, and the Company's intension to recognize the Steelworkers Union. Shortly after the meeting, Mr. Pollock was presented a petition signed by a majority of production and maintenance employees stating that the signatories do not wish to be represented by the Steelworkers or any other union. Due to this expression of employee sentiment, I have been instructed to inform you that Sullivan Industries must change its previous position and decline to recognize or bargain with the Steelworkers Union at this time. [G.C. Exh. 18.]

B. *Discussion and Conclusions*

1. Credibility

As discussed more fully below, this case turns largely on when the Respondent, an admitted successor, was obligated to recognize and bargain with the Union. David Pollock, Respondent's president and chief operating officer, asserted that the Respondent had not hired a substantial and representative complement of employees and had not reached normal business operations until early October. Thus, the Respondent contends that it was not obligated to recognize the Union until October; whereas, the General Counsel contends that the Respondent was obligated to recognize the Union as early as August 10. In disposing of this conflict, an assessment of Respondent's projections in the areas of employee staffing requirements and future business plans must be addressed. The Respondent relies mainly on the testimony of Pollock, its only witness, in support of its projections and summary documents. I find however, that Pollock's testimony was largely conclusionary, and at times elusive, inconsistent and implausible. Pollock's testimony regarding the phrase ''substantial and representative complement'' and when and what he told employees on that subject is a case in point.

At first, Pollock testified that in early July, he assembled the unit employees and informed them of the Union's demand for recognition made earlier that day or the previous day. (Tr. 122–123.) Pollock also testified that he told the employees at that meeting that any determination at that time regarding recognition was premature and that the Company would defer any decision until it hired a ''substantial and representative'' complement of employees. Further, Pollock assertedly told the group that if, at that time, a majority of New Sullivan's employees were former Old Sullivan's employees, ''we may have an obligation to recognize the Union.'' (Tr. 123.) Pollock testified that still later that same day, at a meeting of all his employees (unit and nonunit), he made essentially the same statements regarding ''substantial and representative'' employee complement and the appropriate time to consider union recognition. (Tr. 126.) He maintained that he used the ''substantial and representative'' terminology at the July meetings with employees even while cross-examined until confronted with his source document (R. Exh. 6), which omitted the phrase in question. (Tr. 272.) After showing the document to Pollock, the latter reversed his earlier testimony: ''I did not use that (substantial and representative) terminology in the July meeting[s]. I thought that terminology was in here [R. Exh. 6], I apologize.'' (Tr. 273.)

Incredibly, Pollock asserted that he was merely ''aware'' of the ''substantial and representative'' terminology in July and did not become ''familiar'' with the concept until August. (Tr. 275.) Pollock offered the aforenoted distinction in support of his belated change in testimony. He asserted that he would not have departed from his notes (R. Exh. 6), on such a sensitive and complicated subject and since those notes omitted any reference to the phrase in question, he would not have volunteered any information to employees on that subject.[9] However, by letter dated July 6, Pollock reiterated what he told Truell earlier that day with regard to deferring recognition until such time as the Company ''has hired a substantial and representative complement of employees, commencing normal production.'' (G.C. Exh. 12.) Further, at the same time Pollock conducted the July meetings, he had other notes (R. Exh. 15) with instructions to inform employees about normal production and that it was too early to determine when the Company would reach a representative complement.

In discounting Pollock's credibility, I am less concerned with what he actually told employees in July, than I am with his efforts to resurrect his testimony. In this regard, inter alia, he was elusive, implausible and less than forthright. In sum,

[9] Pollock, as noted previously, is also an attorney. As such, I find it less likely, in the circumstances of this case, that he was candid in discounting his understanding of the phrase in question back in July.

on the basis of demeanor factors and my assessment of Pollock's testimony as a whole, I find that he was unreliable as a witness.

2. The successor's obligation to recognize the Union

The parties stipulated that at all relevant and material times a majority of New Sullivan's unit employees were previously employed by Old Sullivan. (Tr. 16.) The parties also stipulated that at all times relevant and material, New Sullivan, was a successor employer to Old Sullivan, within the meaning of the Act. (Tr. 15.) While, as noted, the Respondent conceded ''successor'' status, it denied that it was obligated to recognize the predecessor's employees' union in August, as alleged in the complaint. The Respondent's denial is based on its assertion that in August, it had not yet hired a ''substantial and representative complement'' of employees and normal business operations were then still a few months away.

The General Counsel and Respondent both rely on the Supreme Court's decision in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 49 (1987), for governing the outcome in the instant case but, of course, arrive at different conclusions. There, the Court observed as follows:

> In deciding when a ''substantial and representative complement'' exists in a particular transition, the Board examines a number of factors. It studies ''whether the job classifications designated for the operation was in normal or substantially normal production.'' See *Premium Foods Inc. v. NLRB*, 709 F.2d 623, 628 (CA9 1983). In addition, it takes into consideration ''the size of the complement on the date and the time expected to elapse before a substantially larger complement would be at work . . . as well as the relative certainty of the employer's expansion.'' Ibid.

In *Fall River*, the predecessor employer went out of business in late summer of 1982. In September 1982, the successor, Fall River, began hiring employees and commenced operations out of the predecessor employer's facilities. Its initial hiring goal was to attain one full shift comprising 55 to 60 employees. Over the first 4 to 6 weeks the successor company was involved in startup operations and an additional month in experimental production. Fall River attained its initial goal of one full shift of workers by mid-January 1983. Of the 55 employees employed in mid-January, 36 of them had been employed by the predecessor employer. The total employee complement (55), represented over half the workers Fall River would eventually hire. The predecessor's employees continued to experience the same working conditions in the employ of Fall River. Thus, the production process remained the same, and the employees continued to work on the same machines under virtually the same supervision. By mid-April 1983, for the first time, the predecessor's employees comprised a minority of Fall River's work force, although just barely (52 or 53 of 107 employees). The successor was found to have been obligated to recognize the Union as of mid-January 1983, at a time when it had begun normal production, hired employees in virtually all job classifications, and attained a substantial and representative employee complement. (Id., at 2451.)

I find that the factors in the instant case, as of August 1988, compare favorably with the factors present in *Fall River* insofar as setting the moment when New Sullivan's duty to bargain arose. Here, as in *Fall River*, the working conditions remained largely the same. Thus, the employees in large part continued to operate the same machines under substantially the same supervision to assemble or manufacture products that had also been made by Old Sullivan. In fact, all products made by New Sullivan were made by Old Sullivan. (Some of the products made by Old Sullivan are no longer made.) (Tr. 221–222.)

The record also disclosed that by August, the production line was substantially off the ground with all departments in operation (Tr. 49–50; see also R. Exh. 9). Pollock testified that approximately 80 percent of New Sullivan's business involved manufacturing compressors or compressor parts, the bulk of which were models D125, D175, and D185.[10] The Respondent also manufactures air operated air drills. (Tr. 100.) As noted above, these products were also manufactured by Old Sullivan. With regard to the compressors, in August, the Respondent exceeded its projected sales and production for models D125 and D175 and equalled its projections for D185. While more D185's were produced in October than August (58 to 20), fewer D185's were produced in December than in August (17 to 20). (R. Exh. 9.) It is noted that Respondent's projections for November and December were 60 and 80 for D185's, far in excess of what was actually produced. (Id.) Pollock explained that in making projections, he had not anticipated taking inventory in December nor had he taken into account the holidays at the end of that month. While he characterized the failure to do so as ''stupid'' (Tr. 177), it does nothing to enhance or inspire confidence regarding the accuracy or reliability of his other projections.[11]

In agreement with counsel for the General Counsel, I find that New Sullivan had attained a substantial and representative complement of its unit work force in August. The record disclosed that for the payroll period ending August 12, New Sullivan employed 79 employees in unit positions (G.C. Exh. 6). That number represents approximately 71 percent of unit employees appearing on the payroll list for the week ending October 7 (G.C. Exh. 7).[12] For purposes of comparison, it is noted, that the Respondent conceded that in October, it had attained a substantial and representative complement of employees. However, as the employee complement in August comprised such a high percentage (over 70 percent) of the complement regarded by the Respondent as material and as the Respondent's projections of work force levels more often than not proved to be less than planned (see R. Exh. 14), I am unpersuaded that the Respondent was justified in with-

[10] The number next to the letter D represents the cubic feet per minute of compressed air which the machine will deliver. These are portable air compressors on wheels. (See, e.g., D185, R. Exh. 3.)

[11] Pollock offered no explanation for producing only 25 D185 units in November although the Company projected producing 60 such units. (R. Exh. 9.) While the Respondent produced 100 D185 compressor units in January 1989, the record also disclosed, that the business is largely seasonal; more units are sold in the winter than in the fall or summer. (Tr. 234–235.) Thus, without more, there is no showing that higher production during the winter or spring months represent more than peak operations rather than normal operations.

[12] The source document (G.C. Exh. 7) notes a figure of 117 total employees; the General Counsel cited 103 employees; I counted and find 111 names.

holding recognition until October.[13] See *Jeffries Lithograph Co.*, 265 NLRB 1499, 1505 (1982).

According to Respondent, the General Counsel had not established that employees were employed in the type of job classifications necessary to fulfill this *Fall River* requirement. In this connection, the Respondent noted, that it had instituted a simplified job classification system which differed from the elaborate classification system used by Old Sullivan. I find that Respondent's reliance on this factor is, in part, undercut, by its stipulation of ''successor'' status (supported by the record). Thus, here, unlike *Fall River*, successorship was never in issue. Of greater significance is, that here, in August, as in *Fall River* in mid-January, the Respondent had hired employees in virtually every job category and those employees possessed the requisite skills (if anything, Old Sullivan required broader skills and versatility). Again, here, as in *Fall River*, ''the Respondent added no new skills to its work force'' at any subsequent date which it deemed critical. (See underlying Board decision, 272 NLRB 839 fn. 1, par. 2 (1984).)

Also militating against the impact or significance of the changes in Respondent's job classification system is that it ''attempted to use terminology familiar to the former Sullivan Machinery Company employees.'' (Tr. 194.) In this connection, as noted above, no new skills were required of its work force. Thus, in the circumstances of this case, it appears that the changes were more of the paper variety than substantive. Further, by using language familiar to Old Sullivan's employees, it tends to diminish any perception these employees might otherwise have had that their jobs had really changed. The perception of continuity, of course, is reinforced where, as here, the predecessor's employees continue to operate the same machines under the same front line supervision and to assemble or manufacture the same products (albeit less of a variety) for largely the same customers. As far as dealing with customers, it is noted, inter alia, that Pollock testified that as part of the interim management team, they ''opene[d] the doors to preserve whatever customer good will was still present from the Sullivan Machinery Company.'' (Tr. 89–90.)

Here, a high degree of substantial continuity existed in August, which evolved from the period of interim management by AAMC (since mid-April during the bankruptcy period). As noted previously, AAMC continued to recognize the Union, honor Old Sullivan's contract, and deducted union dues. New Sullivan was incorporated in March for the purpose of acquiring the assets of Old Sullivan. AAMC and New Sullivan shared, inter alia, common stockholders. In late June, Pollock, while serving as a high official of the AAMC management team offered employment to the large majority of Old Sullivan's employees. (All but 12 employees were offered jobs and most of those were also eventually hired.) Given this backdrop, and noting that Respondent stipulated to ''successor'' status and that a majority of its employees at all material times were former Old Sullivan's employees, I find that the Respondent could not, consistent with *Fall River*, lawfully withhold union recognition in August, at a time when it had attained a substantial and representative work force and a production line that was at or substantially close to normal operations and meeting new customer orders. In these circumstances, an expectancy by employees of union representation is reasonable and legitimate. Clearly, Pollock was not surprised when questioned by employees at the August meeting about the Union's representative status. In fact, Pollock acknowledged that he had intended to discuss union representation at that meeting as that subject was on his agenda (Tr. 135). The Supreme Court, in *Fall River*, noted the problems with union disaffection when a successor unduly delays recognition. There, the Court observed as follows, 483 U.S. at 39:

> If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their their jobs with the successor or if they inclined to blame the union for their layoff and problems associated with it.

In sum, I find that the Respondent was not justified in withholding union recognition until October. *Fall River Dyeing Corp. v. NLRB*, supra; see also *Hospital San Francisco*, 293 NLRB 171 (1989). By doing so, the Respondent improperly undermined the union's majority status thereby tainting the employee petition.[14] As the Respondent was not at liberty to rely on that tainted petition, I find that its withdrawal of recognition was violative of Section 8(a)(5) as alleged.

3. The 8(a)(1) allegations

It is alleged that in August, Pollock made certain statements to his entire work force at a meeting at the Respondent's facility which were coercive in violation of Section 8(a)(1). First, it is alleged in an order consolidating cases, consolidated amended complaint and notice of hearing that Pollock told his employees at this meeting that the Employer would decide in early October whether it would recognize the Union; that if anyone did not want the Union, to come forward anytime, that he has an open door policy; and if no one came forward, the Union would be automatic. (G.C. Exh. 1(1), par. 9.) Shortly before the close of the hearing,

[13] The Respondent planned to have a unit work force entering the month of January 1989 of 159 employees and actually hired 127 employees; it planned on 168 employees for February 1989 and actually had only 136 employees (R. Exh. 14). Pollock testified that he projected from 150 to 160 unit employees as the normal employee complement for the year 1989 (Tr. 262). However, as Pollock was unsure of these projections and as I found him otherwise to be an unreliable witness, I regard them as little more than self-serving predictions and hardly probative.

[14] On or about October 4, 1988, while the underlying refusal to recognize charges were still pending, the Respondent recognized the Union. Within hours of so advising the entire work force, Pollock was handed a petition signed by majority of the unit employees stating that they did not ''wish to be represented'' by the Charging Union ''or any union at this time.'' (R. Exh. 7a.) On October 6, 1988, the Respondent withdrew recognition. Compare, *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985), where the Respondent withdrew recognition on the basis of an employee petition but only after it had actually bargained with the union over several months. There, the Board did not have to address the respondent's earlier refusal to recognize because, inter alia, the parties subsequently met and bargained and the issue was not presented.

counsel for the General Counsel amended the consolidated amended complaint further, by alleging that Pollock also told the employees at the same August meeting that the Respondent was going to do what it intended to do with or without a union, thereby independently violating Section 8(a)(1). (Tr. 293.) While I credit the essence of the remarks ascribed to Pollock, I find, in context, that they fall short of reaching the level of interference, restraint, or coercion, within the meaning of Section 8(a)(1).

The meeting in question was a regularly held general meeting in the cafeteria attended by the entire work force (unit and nonunion employees). At these general meetings, including the meeting in August, Pollock briefed employees on the status of production and informed them of the Company's projections for the upcoming month in production, sales, and shipments.

It appears that at some point during the aforenoted meeting, one of the employees introduced the subject of the Union by asking Pollock about the Union's representative status. It is not asserted that Pollock expressed any union hostility or that he threatened any reprisals to dissuade employees from supporting the Union. While the credited testimony disclosed that Pollock indicated that employees had access to him anytime they wanted and that he had an open door policy, I also find that he testified credibly and without contradiction that he previously made the same statements at general meetings without regard to the Union. As such, I cannot find, without more, that Pollock's reference to an open door policy was calculated or even tended to discourage union activity. Rather, as noted below, Pollock conveyed neutrality on the subject of the Union at the August meeting.

Employee Leon Morin testified that Pollock, in responding to questions raised about the Union, told the employees at the August meeting that he ''would recognize the Union; he has no problem with it.'' While Morin testified that Pollock also told the employees that if they did not want the Union they were at liberty to tell him, I fail to discern, without more, that this invitation was coercive, particularly in the absence of any threat of reprisals or promise of benefits. As testified by Morin, Pollock explained that as more than ''51 percent of the employees were union members'' recognition was ''automatic'' unless the employees came forward to convey their opposition. (Tr. 56–57.) Employee Patrick McCann largely corroborated Morin's testimony with regard to Pollock declaring that he had no problem recognizing the Union but added that Pollock also stated, that this would occur ''once there was a recognizable complement of former employees within the plant.'' (Tr. 83–83.) Contrary to the General Counsel, I find the statements ascribed to Pollock hardly suggest ''to employees the futility of having a bargaining representative.'' Rather, the opposite appears to true, to wit, that union recognition will be ''automatic'' unless employees inform Pollock that they oppose the Union.

I construe Pollock's remarks as a reasonably accurate statement of the law with regard to his obligation to recognize the Union when dealing with a majority of the predecessor's employees. See, generally, *Fall River*, supra; see also *Peoples Gas System*, 275 NLRB 505 (1985) (where, the employer lawfully informed employees that they could resign from the union). Here, while Pollock offered to listen to any union disaffection, it is noted that there is a dearth of evidence tending to show that he offered them any assistance in that regard. Cf. *Gupta Permold Corp*., 289 NLRB 1234 (1988).

I also find the belated amended allegation without merit, to wit, that Pollock unlawfully coerced employees by telling them at the same August meeting that the Company would do what it intended to do with or without a union. The record disclosed that in discussing the subject of the Union, Pollock relied in large part, if not entirely, on his notes. On this subject, the notes indicate in outline form that until the appropriate time to recognize the Union, the Company would make ''every effort to be fair with you (employees)'' and ''will do what we intend to do with or without a union.'' (R. Exh. 15.) Clearly, the remarks, are not per se coercive. See *Camvac International*, 288 NLRB 816 (1988). I am unpersuaded, as argued by the General Counsel, that Pollock's statement ''suggests to employees the futility of having a union.'' It is noted that none of the General Counsel's witnesses recalled or at least referred to the statement in question.[15]

In sum, I find that the record falls short of establishing that the remarks made by Pollock at the meeting in question in August are coercive or are otherwise violative of Section 8(a)(1), noting particularly an absence of any unlawful threats or promise of benefits. Accordingly, I shall recommend that these allegations be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Sullivan Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following described unit of the Respondent's employees is appropriate for collective-bargaining purposes:

> All full-time and regular part-time employees of Respondent employed at its Claremont, N.H. facility, excluding executives, supervisors, assistant supervisors, guards, office and clerical workers.

4. At all material times since on or about August 10, 1988, the Union has been the exclusive collective-bargaining representative of the employees in the above-described unit.

5. By failing and refusing on and after August 10, 1988, to recognize and bargain with the Union as the representative of the employees in the above-described unit, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. While the Respondent briefly recognized the Union in the above-described unit on or about October 4, 1988, it withdrew recognition on or about October 6, 1988, in violation of Section 8(a)(5) and (1) of the Act.

[15] Noting the difficulties Pollock had in recalling what he said at various times, and in the absence of any testimony to the contrary, it is possible that what Pollock actually told the employees was ''with or without a union—management will make every effort to be fair with you'' (R. Exh. 6). According to Pollock, he had both sets of notes (R. Exhs. 6 and 15) back in July. In either case, I find, in context, that the statement is not coercive.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. The General Counsel has not established that the Respondent independently violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain actions designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by first refusing to recognize and bargain with the Union on or about August 10, 1988, and then recognizing the Union on or about October 4, 1988, only to unlawfully withdraw recognition on or about October 6, 1988, in violation of Section 8(a)(5), I shall recommend that the Respondent be ordered to recognize and bargain with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Sullivan Industries, Inc., Claremont, New Hampshire, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as exclusive representative of the employees in the unit found appropriate here, concerning rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Post at Claremont, New Hampshire facility, copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that those allegations found here to be without merit are hereby dismissed.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with United Steelworkers of America, AFL–CIO, as the exclusive representative of the following unit:

> All full-time and regular part-time employees of Sullivan Industries, Inc., at our Claremont, N.H. facility, excluding executives, supervisors, assistant supervisors, guards, office and clerical workers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, on request, bargain collectively with the aforesaid Union as the exclusive representative of all employees in the appropriate unit described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

SULLIVAN INDUSTRIES, INC.